

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LIBERATION NEWSPAPER
2969 Mission Street
San Francisco, CA 94110

Plaintiff,

v.

DEPARTMENT OF STATE
2201 C Street, NW
Washington, D.C. 20520

Defendant.

Civil Action No. 13-836

**COMPLAINT FOR INJUNCTIVE RELIEF
(FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552, *et seq.*)**

1. This action is brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*, to enforce the public's right to information about the federal government's payments to journalists in the United States who presented themselves as independent in their reporting and who saturated the Miami media with hostile, inflammatory and prejudicial stories regarding Cuba and the Cuban Five during the U.S. government's arrest and trial of the Cuban Five in Miami.
2. The State Department is in possession of responsive information regarding payments made to these journalists. The State Department is refusing to provide this information to the Plaintiff requestor, Liberation Newspaper.
3. The "Cuban Five" are five Cuban nationals who were arrested by the U.S. government and tried and convicted in Miami for offenses in connection with their activities on U.S. soil to prevent violent and terrorist attacks against the nation of Cuba. They were arrested in 1998

and convicted in 2001. The mission of the five men was to stop terrorism and their actions were peaceful and calculated to protect their homeland from attacks or interventions launched from U.S. soil against Cuba. The Cuban Five also provided information to the FBI regarding terrorist threats emanating from Miami, however, they were instead arrested and subject to relentless prosecution by the U.S. government. The Cuban Five have challenged their convictions as unlawful.

4. After the trial and convictions, it was revealed that the U.S. government, through its official propaganda agencies, the United States Information Agency (USIA), the Broadcasting Board of Governors (BBG), and its Office of Cuba Broadcasting (OCB), engaged in covert payments to ostensibly “independent” Miami journalists who, at the same time as the government conducted its prosecution, were permeating the domestic Miami media with reports that constituted a sustained effort to create an atmosphere of hysteria and bias against Cuba and the Cuban Five.
5. These U.S. government-paid journalists propagandized U.S.-based *domestic* public opinion including the jury pool and the sitting jury in violation of the integrity of the trial of the Cuban Five.
6. These revelations raise serious concerns about Due Process, the constitutional right to a fair trial and a corruption of justice.
7. Moreover, the U.S. government is prohibited from funding activities to influence and propagandize domestic public opinion under the Smith-Mundt Act of 1948, 22 U.S.C. § 1461. A substantial public interest exists for disclosure relating to the operation of government, especially where the underlying misconduct relates to the propagandizing and

manipulation of U.S. based persons through seemingly independent government-paid journalists engaged in the forming and malforming of domestic political opinion.

8. There has been widespread interest and public concern regarding the actions of the U.S. government in paying journalists in Miami who purported to be independent press.
9. This request is imperative to the effort at transparency that is required in order for there to be an accurate accounting and assessment of the activities of the United States government in regard to Cuban relations, in regard to the right to a fair trial, and in regard to the right of the people of the United States to be free from government-sponsored and covert propaganda.
10. Serious concerns about the case of the Cuban Five have been raised by former President Jimmy Carter; Col. Lawrence Wilkerson, former Chief of staff to Secretary of State Colin Powell; writer Alice Walker; actors Danny Glover and Martin Sheen; ten former Nobel prize winners; former U.S. Attorney General Ramsey Clark; Delores Huerta, co-founder of United Farm Workers; Wayne Smith, former Chief of the U.S. Interests Section in Cuba; Amnesty International, and many thousands of people and organizations in the United States and worldwide.
11. Liberation Newspaper has sought and been denied records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*, as amended.
12. In 2010, Liberation Newspaper requested production of any and all underlying contracts relating to payments to forty-four (44) journalists identified by name. Liberation Newspaper issued separate requests to both the BBG and the State Department. The BBG produced some responsive information to Liberation Newspaper. Other responsive information is in the possession of the State Department which holds the relevant records from the USIA, which ceased to exist in 1999.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to the Freedom of Information Act, 5 U.S.C. §§ 552(a)(3), (a)(4)(B) and (a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.
14. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

15. Plaintiff Liberation Newspaper is a news media outlet which, among other things, gathers information of interest to its readers and constituency and to the public.
16. Liberation Newspaper is organized and operated to publish news to the public, including information about current events or that would be of current interest to the public. One of the essential functions of Liberation Newspaper is its editorial analysis.
17. Liberation Newspaper distributes its work to audiences nationally and internationally, publishing in both English and Spanish, and distributes its work through multiple means, including the print publication of a bi-weekly bilingual newspaper as well as the electronic publication of a substantial web site with current and historic news, information and analysis.
18. The records requested by Liberation Newspaper are not for commercial use and are sought for review, research and analysis by Liberation Newspaper and for publication and dissemination to the public in the form of news articles and analyses.
19. Liberation Newspaper has undertaken an investigation into the government-paid journalists issue underlying this request for information and has published analysis of the materials produced through its separate request to the BBG in its newspaper, on its website, and on a website devoted to covering this matter, ReportersforHire.org.

20. Liberation Newspaper has represented and submitted that it will publish news articles that will encompass the subject matter of the requested materials and shall also disseminate the information specifically requested by the instant Freedom of Information Act request, including publication in its periodical newspaper as well as through electronic dissemination of news stories and analysis. *See Attachment 1.*
21. Liberation Newspaper represented and submitted that it is a representative of the news media in its FOIA request. *See Attachment 1.*
22. Liberation Newspaper is a representative of the news media for purposes of the fee provisions of the FOIA. *See 5 U.S.C. § 552(a)(4)(A)(ii); 22 C.F.R. § 171.11(o).*
23. The Department of State has not and does not dispute that Liberation Newspaper qualifies as a “representative of the news media” as that term is used within the FOIA.
24. Liberation Newspaper represented and submitted that the records subject to the FOIA request are not sought for commercial use. *See Attachment 1.*
25. Liberation Newspaper is not a commercial use requestor for the purposes of the FOIA. *See 5 U.S.C. § 552(a)(4)(A)(iii).*
26. Benjamin Becker is currently the Editor of Liberation Newspaper and was the editor at the time he submitted the FOIA request. *See Attachment 1 (identifying Mr. Becker as the editor).*
27. The Department of State has not and does not dispute that Liberation Newspaper is a non-commercial use requestor pursuant to the FOIA.
28. Defendant United States Department of State is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1).
29. Integrated within the Department of State are the Office of Cuba Broadcasting and the Broadcasting Board of Governors (BBG), and their predecessor agency, the United States

Information Agency (USIA), which are responsible for the operation of Radio Marti and TV Marti by which the U.S. Government broadcasts information and propaganda into Cuba and into Florida.

30. The Department of State possesses or has control over all responsive information that may have been in the possession of the USIA.

LIBERATION NEWSPAPER'S FOIA REQUEST

31. On October 20, 2010, Liberation Newspaper filed a request under the Freedom of Information Act with the Department of State.

32. The FOIA request sought:

[a]ny and all contracts in the possession or control of the Department of State regarding all grants, payments, purchase orders and/or obligations of funds to be transferred to the journalists that are identified in the enclosed spreadsheet [specifying 44 journalists by name]. This information is requested from the Department of State, including from the United States Information Agency and its successor agency, the Broadcasting Board of Governors and the Office of Cuba Broadcasting. We are requesting contracts from January 1998 through December 2002. . . .

See Attachment 1, October 20, 2010, FOIA Request from Liberation Newspaper.

33. The FOIA request specifically indicated that it encompassed the responsive records once in the possession or control of the USIA, which are now within the possession or control of the Department of State.

34. The October 20, 2010, FOIA request contained a request for expedited processing. *See* Attachment 1.

35. The October 20, 2010, FOIA request contained a request for a public interest fee waiver. *See* Attachment 1.

Receipt of the FOIA Request by Department of State on October 25, 2010

36. The October 20, 2010, FOIA request was delivered by United States Postal Service certified mail, return receipt requested.
37. The State Department received the request on October 25, 2010.
38. On October 25, 2010, an individual by the name of J. Jackson signed the return receipt, accepting the FOIA request on behalf of the State Department.
39. A true and correct copy of J. Jackson's signature, as reflected in the business records of the United States Postal Service, is reflected as Attachment 2.

The Department of State Failed to Comply With the 10-Day Time Limit for Making a Determination Whether to Provide Expedited Processing, and to Provide Notice of Such Determination to Liberation Newspaper

40. The FOIA requires, where a request for expedited processing has been made, "that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request." 5 U.S.C. § 552(a)(6)(E)(ii)(I).
41. In other words, 5 U.S.C. § 552(a)(6)(E)(ii)(I) establishes a time limit requiring the Department of State to have provided notice to Liberation Newspaper of the expedited request determination within 10 days after the date of the request.
42. The Department of State failed to comply with the 10 day time limit for making a determination and providing notice of the expedited processing determination set forth in 5 U.S.C. § 552(a)(6)(E)(ii)(I).

The Department of State Failed to Comply With the 20-Day Time Limit for Making a Determination Whether to Comply with the FOIA Request, and to Provide Notice of Such Determination to Liberation Newspaper

43. The FOIA requires the Department of State to "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether

to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor,” along with provision of appeal rights. 5 U.S.C. § 552(a)(6)(A)(i).

44. The Department of State failed to comply with the 20 day time limit for making a determination, and providing notice of the determination whether to comply with the FOIA request, as set forth in 5 U.S.C. § 552(a)(6)(A)(i).

The Department of State May Not Assess Search or Duplication Fees Because it Has Failed to Comply With a Time Limit Under 5 U.S.C. § 552(a)(6)

45. The FOIA provides that, absent exceptional circumstances neither claimed nor present herein, an agency shall not assess search fees or duplication fees for a news media requestor if the agency has failed to comply with any time limit set forth under 5 U.S.C. § 552(a)(6).

See 5 U.S.C. § 552(a)(4)(A)(viii).

46. Including as set forth above, the Department of State has failed to comply with a time limit or limits under 5 U.S.C. § 552(a)(6).

47. In November 20, 2010, e-correspondence with the Department of State, Liberation Newspaper submitted and represented that the Department failed to comply with mandatory time limits and is therefore barred from assessing fees for Liberation Newspaper’s FOIA request. *See* Attachment 3.

48. The Department of State has not and does not deny that, due to the effect of its failure to comply with said time limits, it is barred from assessing fees for Liberation Newspaper’s FOIA request.

49. Because the Department failed to comply with mandatory time limits, it is therefore barred from assessing fees for Liberation Newspaper’s FOIA request. *See* 5 U.S.C. § 552(a)(4)(A)(viii).

November 20, 2010, Follow Up After the Department's Failures to Respond

50. As of November 20, 2010, Liberation Newspaper had received no notice, notifications or response whatsoever from the Department of State to the October 20, 2010, FOIA request.
51. On November 20, 2010, Liberation Newspaper sent a follow up e-mail inquiring regarding the status of the FOIA request. The e-mail was sent by Mr. Becker. *See Attachment 3.*
52. The November 20, 2010, e-mail was transmitted to foiastatus@state.gov .
53. The e-mail address foiastatus@state.gov is the Department of State designated e-mail address for transmitting status inquiries regarding FOIA requests.
54. The Department of State has in place policies, practices and procedures for monitoring and responding to incoming communications to its designated e-mail address, foiastatus@state.gov .
55. The Department of State received the November 20, 2010, e-mail from Mr. Becker, the Editor of Liberation Newspaper.
56. Mr. Becker wrote in the November 20, 2010, e-mail as follows:

I am writing in regard to a Freedom of Information Act (FOIA) request I submitted for Liberation Newspaper to the Department of State on October 20, 2010.

The request was sent by certified mail, return receipt requested, which indicates the date of receipt by the Department as October 25, 2010.

Liberation Newspaper requested expedited processing of the October 20 request pursuant to 5 U.S.C. § 552(a)(6)(E). To date, we have received no response at all from the Department of State, although response was required to be received by November 4. Accordingly, the Department is now barred from assessing fees for Liberation Newspaper's request pursuant [to] 5 U.S.C. § 552(a)(4)(A)(viii).

Please let me know as soon as the materials are available so that we may arrange for a courier to pick them up. Feel free to contact me by email. Thank you for your assistance.

See Attachment 3.

57. The Department of State did not respond to the November 20, 2010, e-mail.

June 8, 2011, Follow Up After the Department's Persistent Failure to Respond

58. On June 8, 2011, Mr. Becker on behalf of Liberation Newspaper sent another correspondence following up on the Department's failure to respond to the FOIA request. *See* Attachment 4.

59. By e-mail dated June 9, 2011, Harry A. Hammitt responded on behalf of the Department of State via e-mail. Mr. Hammit advised that the FOIA request had been assigned a case number, but he would have to contact another person to "try to see where it stands." *See* Attachment 5.

60. Mr. Hammitt also enclosed a letter dated November 9, 2010, which purportedly acknowledged the FOIA request and denied the request for expedited processing. *See* Attachment 6.

61. The November 9, 2010, letter was never previously received.

62. The November 9, 2010, letter is a form letter. It is addressed to "Dear Requestor." The letter does not bear any reference to Liberation Newspaper as a requestor. It does not bear any address information or any destination information (e-mail, facsimile or other), let alone destination / recipient information specific to Liberation Newspaper.

63. Even on its face, disregarding all other irregularities and omissions and defects, the November 9, 2010, letter *even had it been created and sent on November 9, 2010*, would still fail to comply with the 10-day time limit set forth in 5 U.S.C. § 552(a)(6)(E)(ii)(I).

64. The November 9, 2010, letter – delivered on July 9, 2011 – does not explicitly state that the Department has made a determination to comply with the FOIA request. It does not provide any appeal rights for any related adverse determination. It states, with respect to compliance that the Department "will begin the processing of your request." *See* Attachment 6.

- 65. The November 9, 2010, letter – delivered on July 9, 2011 – denied expedited processing.
- 66. The November 9, 2010, letter – delivered on July 9, 2011 – states “we will now defer our decision to grant or deny your request for a fee waiver until we are able to determine whether the disclosure . . . is in the public interest.”
- 67. No appeal rights are given for denial of the fee waiver.
- 68. No additional information was indicated as being needed by the Department in order to make its fee waiver determination.

July 8, 2011, Follow Up by Liberation Newspaper

- 69. Although Mr. Hammitt stated in his June 9, 2011, correspondence that he would follow up with the person processing the FOIA request and “try to see where it stands,” no further communication was forthcoming from Mr. Hammitt or the Department of State.
- 70. On July 8, 2011, Mr. Becker on behalf of Liberation Newspaper followed up again with correspondence. He requested immediate production. *See Attachment 7.*
- 71. Mr. Becker asked by what method the November 9, 2010, acknowledgment was purportedly sent as it was not received by any means and did not contain addressee / recipient information anywhere on its face or in its content.
- 72. Mr. Becker also represented and submitted, again, that the Department was barred from assessing any fees due to the failure to comply with time limits. Mr. Becker noted that “[e]ven if the November 9 letter had been received in a timely fashion, it would have been beyond the deadline.” *See Attachment 7.*

July 8, 2011, Appeal of Denial of Expedited Processing

- 73. On July 8, 2011, Liberation Newspaper filed its appeal of the denial of expedited processing. *See Attachment 8.*

74. In its FOIA request, Liberation Newspaper sought and requested expedited processing due to the urgent need to inform the public about alleged or actual unlawful government activity and as a representative of the media, primarily engaged in the dissemination of information.
75. In its appeal, Liberation Newspaper reiterated the need for disclosure of the requested information as it “may evidence serious government malfeasance in intentionally and covertly funding the ‘independent’ U.S. media to propagandize and influence domestic public opinion including the jury pool and sitting jury during the high-profile government prosecution and the resulting conviction of the Cuban Five.” *Id.*
76. The appeal noted that, “This request is crucial to the effort at transparency that is required in order for there to be an accurate accounting and assessment of the activities of the United States government in regard to Cuban relations, in regard to the right to a fair trial, and in regard to the rights of the people of the United States to be free from government-sponsored covert propaganda.” The appeal noted the then-recent report submitted from Amnesty International to Attorney General Eric Holder seeking review of the case of the Cuban Five and raising questions about the payments to journalists and the right to a fair trial. *Id.*
77. The appeal noted that the Cuban Five were serving “lengthy prison sentences. They are in the process of their final Habeas Corpus appeals at this moment in an attempt to have their convictions overturned or to win a new trial. In this interest of their right to seek a fair trial in U.S. Courts, and for the public to have confidence in the U.S. justice system and its government’s prosecutions, it is in the public interest and the absolute interest of justice to urgently make available relevant documents.” *Id.*
78. The appeal also addressed additional bases for expedited processing and also noted that the “the Cuban 5 have been held in punitive conditions including at times, solitary confinement,

and two of the men held have never been allowed to see their wives, as the U.S. government refuses to grant the wives the necessary visas.” *See* Attachment 8.

July 11, 2011, E-mail from the Department of State

79. By e-mail dated July 11, 2011, Mr. Hammitt responded and conceded that “[t]here is no way to confirm the address to which the [November 9, 2010] letter was sent.” *See* Attachment 9.
80. Mr. Hammitt did not dispute or deny that the Department was barred from assessing any fees due to the failure to comply with time limits. Mr. Hammitt did not provide any information on the status of the processing of the request or the date of completion. He advised that the person processing the FOIA request “is out until the beginning of August” and advised Mr. Becker to wait until August and re-contact the Department of State then and remind him of the situation again.

August 16, 2011, Reminder / Follow Up Letter from Liberation Newspaper

81. Because Mr. Hammitt had asked to be reminded in August of the FOIA request, by e-mail dated August 16, 2011, Mr. Becker sent him another follow up letter and asked for a status update. *See* Attachment 10.
82. The State Department did not respond to this inquiry.

September 8, 2011, Denial of Expedited Processing Administrative Appeal

83. By letter dated September 8, 2011, the Department denied Liberation Newspaper’s expedited processing appeal.
84. The denial letter is very short, less than one page and a half long.
85. The letter summarily represented that “[b]ased on the documentation submitted, you do not demonstrate sufficient justification to warrant expeditious processing.” *See* Attachment 11.

Continued Failure – Over 2 ½ Years After the FOIA Request – To Produce Any Responsive Materials Whatsoever

86. To date, the Department has produced not a single record in response to Liberation Newspaper's October 20, 2010, FOIA request.
87. On May 17, 2013, Liberation Newspaper transmitted another inquiry as to the status of this production by e-mail to the official e-mail address designated for such purpose by the Department of State: foiastatus@state.gov . *See* Attachment 12.
88. Liberation Newspaper requested an estimated date of completion for the request.
89. On May 21, 2013, Chris Barnes on behalf of the Department of State responded to the request without an estimated date of completion. He stated that he had contacted the "Case Analyst" with the request and that a response "would take some time." The Department of State FOIA office did not offer to provide a response, but invited Mr. Becker to contact the office "in a week or so and we should have an answer for you." *See* Attachment 13.
90. Fourteen days later, on June 4, 2013, having still received no estimated date of completion or status information, Liberation Newspaper again wrote to the State Department asking for an estimated date of completion and asked that the information be provided by the close of the business day. *See* Attachment 14.
91. The Department of State did not respond to this inquiry. To date, no documents have ever been produced by the Department of State in response to the October 20, 2010, FOIA request.

EXHAUSTION OF REMEDIES

92. To date, the State Department has failed to comply with the applicable time limit provisions under the FOIA, to timely process the FOIA request or produce any records whatsoever in response to the FOIA request, despite ample opportunity and passage of time. *See* 5 U.S.C. § 552(a)(6)(C). This constitutes a full or constructive denial of the FOIA request.

93. Likewise, the State Department has failed to comply with the applicable time limit provisions under the FOIA, or to substantively respond to Liberation Newspaper's request for a public interest fee waiver, despite ample opportunity and passage of time. This constituted a full or constructive denial of the public interest fee waiver request.
94. The State Department did, however, formally deny Liberation Newspaper's request for expedited processing. Liberation Newspaper did timely appeal and complete the administrative appeal process with respect to the denial of expedited processing. Accordingly, Liberation Newspaper has exhausted remedies with respect to its request for expedited processing.

**CAUSE OF ACTION UNDER THE FOIA
CLAIMS FOR RELIEF
Violations of Freedom of Information Act
Wrongful Withholding of Agency Records
Improper Denial of Expedited Processing
Improper Denial of Public Interest Fee Waiver Request
Failure to Provide Estimated Date for Completing FOIA Request**

95. Liberation Newspaper repeats and re-alleges paragraphs 1 - 94.
96. The State Department has wrongfully withheld agency records requested by Liberation Newspaper and has failed to comply with the statutory time for the processing of FOIA requests.
97. At no time has any exemption to production been claimed within the scope of records requested.
98. The State Department has failed to grant Liberation Newspaper's request for a public interest fee waiver or to comply with the statutory time for the processing of such requests.
99. The State Department has improperly denied Liberation Newspaper's request for expedited processing.

100. Liberation Newspaper is entitled to injunctive relief with respect to the expedited release and disclosure of the requested records without charging of fees.
101. Liberation Newspaper is entitled to immediate production of the requested records, the granting of the public interest fee waiver, the granting of expedited processing, the avoidance of any search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(viii), and to the provision of an estimated date of production in response to its repeated requests for such.

PRAYER FOR RELIEF

Wherefore, Plaintiff Liberation Newspaper prays that this Court:

- a. Declare that Defendant State Department's failures to disclose the requested records, to grant the public interest fee waiver request, to grant the request for expedited processing and to provide an estimated date of completion are unlawful;
- b. Order the State Department to process immediately the request, to conduct an adequate search and to promptly produce the requested records in their entirety;
- c. Order the State Department to make the requested records available in their entirety in electronic format, without costs or fees;
- d. Order expeditious processing in this action;
- e. Award Liberation Newspaper its costs and reasonable attorneys' fees incurred in this action; and
- f. Grant such other relief as the Court may deem just and proper.

June 5, 2013

Respectfully submitted,

/s/ Mara Verheyden-Hilliard
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